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No. 88-1897

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police.

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR. DOMINIC J. JOCOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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QUESTION PRESENTED

Whether the Michigan Court of Appeals properly concluded on the basis of the record established in the trial court that the Michigan State Police sobriety roadblock program was unconstitutional, in violation of the Fourth Amendment to the United States Constitution?

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STATEMENT OF THE CASE

This action was filed by Respondents in May 1986 seeking an injunction prohibiting the Petitioners from instituting sobriety roadblocks. Respondents alleged that the roadblocks violated rights secured by both the Fourth Amendment of the United States Constitution and Article I, §11, of the Michigan Constitution.

Hearings were conducted on Respondents' Motion for Preliminary Injunction in May and June 1986. During the course of these hearings, the parties stipulated that the trial court's decision on the Motion for Preliminary Injunction would also serve as the determination of Respondents' additional request for permanent injunctive relief.

At the hearing, Respondents demonstrated three general points: the manner in which the roadblocks would operate, how such roadblocks infringed on the privacy interests of the driving public, and, most importantly, that such roadblocks are not an effective means of addres-

sing the drunk driving problem.

One of these witnesses was Dr. Lawrence Ross, a professor of sociology at the University of New Mexico, and one of the nation's preeminent authorities on the subject of deterring the drinking driver. Dr. Ross testified that any law enforcement technique could have a short term favorable impact on drunk driving statistics if it creates a public perception that detection and punishment of the drinking driver is somehow enhanced. However, according to Dr. Ross' analysis of all studies on the subject, the deterrent effect of any drunk driving program diminishes rapidly if and when the driving public realizes that the prospects of detection and arrest as the result of this technique are not great. This phenomenon of rapidly dissipating deterrent impact was described by Dr. Ross as a learning curve: the public may, in the short term, alter its behavior in the face of a novel police practice, but, should the public come to recognize that the program does not increase the

certainty of punishment, the program no longer influences driving behavior.

Dr. Ross also testified that the "learning curve" phenomenon would apply to sobriety roadblocks. To be effective for even a limited period of time, roadblocks must be widely publicized and instill in the public the feeling that this police practice increases the possibility of detecting drunk drivers. However, as Dr. Ross testified, as a tool for arresting drunk drivers, sobriety roadblocks are worthless.

Data taken from a number of studies indicate that less than one percent of all drivers who pass through such roadblocks are arrested for drunk driving, and no study ever conducted has indicated a high roadblock arrest rate. Therefore, according to Dr. Ross, once the driving public grasps the limited arrest threat posed by roadblocks of this type, whatever short term deterrent effect this practice possessed would dissipate. Dr. Ross also noted that no report or study existed which demonstrated a long

term deterrent effect achieved through sobriety roadblocks.

Dr. Ross' testimony that sobriety roadblocks were not an effective tool in fighting drunk driving was reiterated by three other witnesses called by Plaintiffs, each of whom was a county sheriff in Michigan.

Macomb County Sheriff, William Hackel, testified that under his direction, his county implemented a number of programs which have been successful in removing drunk drivers from the roads. Based on his 23 years of experience in law enforcement, Sheriff Hackel indicated that these alternative programs would provide a better method for arresting and deterring drunk drivers. Sheriff Hackel further testified that the Michigan Sheriff's Association, of which he was President, voted to formally oppose the use of sobriety roadblocks in this state.

Sheriff Hackel's views on the sobriety roadblock concept were shared by the Sheriff of Kalamazoo County, Thomas Edmonds, and Wayne

County Sheriff, Robert Ficano. Sheriff Edmonds testified that traditional road patrols in which officers stop drivers for alcohol related offenses based on observed driving behavior are a more effective tool against drunk driving than roadblocks. He also expressed the view that the ineffectiveness of roadblocks as compared to roving patrols would be even more pronounced in the rural areas of his county.

Sheriff Ficano emphasized that the use of roving patrols, which stop vehicles based on an individualized suspicion, would be a more efficient manner of addressing the drunk driving problem. For this reason, Wayne County has refused to participate in the State Police roadblock program, and has no plans to adopt such a program.

The testimony given by Sheriffs Hackel, Edmonds and Ficano was motivated by a single overriding concern. As sheriffs, their jobs consist of providing citizens with the most effective method of fighting crime while recogniz-

ing the economic restraints placed on that goal. Confronted with the reality that they do not operate with unlimited resources, all three sheriffs agreed that roving patrols would be a more effective use of valuable law enforcement resources than committing 12 or more officers to a single location to conduct a roadblock at which the statistical likelihood of achieving arrests is minimal.

Colonel Gerald Hough of the Michigan State Police testified that between eight and 12 officers would be needed for the operation of a roadblock. These officers would be both State Police troopers and members of local law enforcement departments. Hough conceded that local officers working in sobriety roadblocks might have to be removed from other patrol responsibilities to assume roadblock duties.

Colonel Hough acknowledged that other states which have implemented sobriety roadblocks have not obtained large numbers of arrests. He therefore agreed with Dr. Ross' as-

sessment that the purpose of Michigan's program could not be to obtain significant drunk driving arrests. Hough maintained, instead, that the roadblock program is designed to deter drunk drivers. He conceded, however, that he had no empirical evidence of any kind to support the conclusion that roadblocks acted as a deterrent to drunk driving.

Following the presentation of Respondents' proofs, Petitioners called several witnesses, including Lieutenant Raymond Cotton of the Maryland State Police. The Michigan roadblock program had been patterned after Maryland's model. Lieutenant Cotton conceded that the only empirical evidence demonstrating the effectiveness of its program as a deterrent had to be derived from a three month pilot study conducted in two Maryland counties from December 1982 through February 1983. For that study,[1]

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1 The statistical results derived from Maryland's pilot study are reprinted in the Appendix to this Brief.

Maryland authorities selected two demographically similar counties. In one of these counties sobriety roadblocks were instituted; in the other (the control county), no roadblocks were employed. Following the end of the three month study, the driving statistics in these two counties were analyzed in two respects. First, the relative performance of the two counties during the three month pilot program in which the checklanes were used was compared with the counties' respective statistics for the same three month period one year before. Second, the two counties' performance during the three month period was compared with the preceding three months, September through November 1982.

With respect to the first comparisons, the Maryland statistics indicated that while alcohol related accidents in the county where roadblocks were imposed went down by 10%, the incidence of such accidents in the control county was reduced by 11%. In addition, the county in which roadblocks were implemented saw its

number of fatal accidents more than double, from 3 in the year before the pilot program to 8 during the period of the study. Meanwhile, the control county's fatal accident rate fell from 16 the previous year to 3 during the pilot program.

The comparison between the 3 months during which the pilot program was instituted and the preceding 3 months was similiarly unsupportive of any claim of deterrence derived from sobriety roadblocks. Alcohol related accidents in the county where roadblocks were used fell 16% from the previous 3 months. However, in the control county, alcohol related accidents fell by 12%. Similarly, the number of fatal accidents fell in the target county by 27%, while it fell 25% in the county where no roadblocks were conducted.

Ultimately, Lieutenant Cotton was forced to concede that the pilot study did not establish conclusively that roadblocks acted as a deterrent against drunk driving.

Another of Petitioners' witnesses was

Lieutenant William Slaughter of the Michigan State Police, who testified concerning the factors which an officer at a roadblock could consider in assessing whether an individual would be detained for further investigation. These factors include the presence of an odor of alcohol, the driver's manner of speaking, whether the driver's eyes were bloodshot, whether his or her face was flushed, the general appearance of the driver's clothing, and whether the driver's shirt was unbottoned. Any one of these factors would be enough to allow the roadblock officer to detain an individual for further investigation. Indeed, Lieutenant Slaughter indicated in his deposition that an officer who stops a vehicle at such a roadblock could detain the driver for any one of these reasons or, theoretically, for no reason whatsoever.

On July 24, 1986, the trial court issued a comprehensive opinion adjudicating that Petitioners' sobriety roadblock program violated rights guaranteed by both the United States and

Michigan Constitutions.

Petitioners appealed the trial court's judgment to the Michigan Court of Appeals. In a unanimous opinion dated August 1, 1988, the Court of Appeals affirmed the trial court's determination that the roadblocks violated Respondents' constitutional rights. The Michigan Supreme Court, on February 22, 1989, denied Petitioners' Application for Leave to Appeal.

ARGUMENT

I. BASED ON THE RECORD PRESENTED IN THIS CASE, THE CONCLUSION THAT SOBRIETY ROADBLOCKS CONSTITUTE A VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS PROPER.

Both the trial court and the Michigan Court of Appeals applied the Fourth Amendment standard developed by this Court in Brown v Texas, 443 U.S. 47 (1979):

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

Id. at 50-51 (citations omitted).

The balancing test described in Brown, supra, has been repeated in identical or similar language in various decisions of this Court. Skinner v Railway Labor Executive Assoc., ___ U.S. ___; 109 S.Ct. 1402, 1414 (1989); Delaware v Prouse, 440 U.S. 648, 654 (1979). Petitioners do not attack the test employed by the courts below. Instead, they contend only that the courts misapplied that balancing test to the facts presented at trial.

The Petitioners' assertion of error is, therefore, primarily premised on their disagreement with the factual conclusions reached below. However, a review of the record established at trial demonstrates that the courts below did not err in finding constitutional violations.

A. Gravity of the Public Concern.

Respondents did not bring this case in an attempt to minimize the danger posed by persons who drive while intoxicated, or to suggest

in any way that drunk driving is not a serious societal problem. The trial court found that, "...there is a grave and legitimate State interest in curbing drunk driving." (74a.) Respondents do not disagree with this conclusion.

B. The Degree to Which the Seizure Advances the Public Interest.

This element of the Fourth Amendment balancing test was the central focus of Respondents' case below. Respondents established at trial that sobriety roadblocks were ineffective in addressing the serious problem of drunk driving. After addressing the evidence on this point, the trial court agreed that sobriety roadblocks do not advance the public interest in combatting drunk driving.

Dr. Lawrence Ross, one of the foremost experts in the country on deterring drunk driving, testified that as a means of directly removing drunk drivers from the road through on-the-scene arrests, sobriety roadblocks are worthless. Dr. Ross' conclusions on this point

were completely supported by Petitioners' own witnesses. Colonel Hough and Inspector Fladseth of the Michigan State Police both acknowledged that implementation of the sobriety roadblocks could not be justified on the basis of the limited number of arrests made during the stops. The statistical evidence provided at trial also demonstrated the complete ineffectiveness of roadblocks as an arrest tool. Based on this evidence, the trial court properly found that "sobriety checkpoints have not been shown to be an effective means for apprehending drunk drivers." (83a.)

Petitioners claimed, however, that sobriety roadblocks, while resulting in few arrests, might nonetheless indirectly reduce the incidence of drunk driving by acting as a deterrent. As the trial court found, Petitioners' deterrence argument was also unsupportable.

Dr. Ross testified that any program developed to combat drunk driving which raises public consciousness on this problem and holds

out the prospect of increased risk of detection could have a short term positive effect on drunk driving statistics. However, the long term effect of any drunk driving program must be based on public recognition of the fact that the program enhances the prospect of arrest for drunk driving. In Dr. Ross' terms, the driving public is subject to a learning curve -- once it learns that the prospect of being punished for drunk driving is not as great as it was led to believe, any deterrent effect ends.

Dr. Ross also noted that the Michigan sobriety roadblock program could have the opposite effect from that intended by its proponents. As Colonel Hough testified, only one sobriety roadblock would be in operation on any given night, and the county in which the roadblock was to be set up would be announced in advance and given extensive publicity. Dr. Ross noted that such a program would be no threat whatsoever to an individual outside the targeted county, and he further suggested that the

resulting program could be counterproductive in suggesting to drivers outside the targeted county that the chances of being detected for drunk driving were reduced because of the concentration of police resources elsewhere.

The significance of Dr. Ross' testimony was fully explored by the trial court, which made these critical factual findings:

> [S]obriety checkpoints cannot be expected to achieve any significant level of apprehending drunk drivers. This finding, in the Court's opinion, essentially undermines the whole theoretical basis for concluding that checkpoints can be effective in deterring drunk drivers, (i.e., that the public would fear being arrested for drunk driving if sobriety checkpoints were implemented, and thus, would not engage in drunk driving). Once the public perceives the truth about the low chance of a drunk driver actually being apprehended in a sobriety checkpoint, it cannot be reasonably supposed that those who are inclined to drink and drive will perceive a sobriety checkpoint as a significant threat to their being arrested.

(App. 95a-96a.)

Petitioners cannot concede that sobriety roadblocks achieve few arrests and, at the same time, attempt to justify the imposition of

these intrusions on the basis of an amorphous deterrent effect. The number of arrests achieved through this program and its deterrent effect are, as the trial court found, inextricably linked.

In an attempt to counter this uncontradicted evidence, Petitioners initially relied on statistics derived from the State of Maryland's use of sobriety roadblocks to suggest a possible deterrent effect. Two representatives of the Michigan State Police, Colonel Hough and Lieutenant Slaughter, candidly acknowledged that they knew of no data from Maryland supporting the view that sobriety roadblocks act as a deterrent. Indeed, Lieutenant Cotton of the Maryland State Police ultimately acknowledged that the Maryland program has not conclusively established any deterrent effect associated with the use of sobriety roadblocks. The statistics derived from the only effort to compare the effects of the Maryland roadblock program on alcohol related accidents (see Respondents' Ap-

pendix A) demonstrated only that alcohol related accidents went down in the county where the roadblocks were instituted by 10%, while they were reduced by an even greater percentage in the county where no roadblocks were conducted. These same statistics indicated that fatal accidents rose in the county where checklanes were employed by 167%, while fatalities in the county where no checklanes were used fell by 70%.

The statistics presented were also addressed at length in the trial court's opinion. (App. 83a-92a.) Based on this analysis, the trial court concluded that the data "does not support the deterrent effects of checkpoints." (App. 92a.)

In addition to demonstrating that sobriety roadblocks are not effective in arresting or deterring drunk drivers, Plaintiffs also presented considerable evidence indicating that such roadblocks are, at best, simply unnecessary in the fight against drunk driving. The three county sheriffs who testified gave their

professional views that requiring 12 officers to be stationed at a specific location would be a less effective use of limited police resources than traditional roving patrols. This testimony was corroborated by witnesses from the Michigan State Police, who testified that State Police officers receive considerable training in detecting drunk drivers based on objective driving characteristics and are highly skillful in detecting drunk drivers.

After reviewing the entire record, the trial court concluded that sobriety roadblocks are neither an effective means of deterring drunk drivers, nor do they have any significant deterrent effect. (App. 101a-102a.)

The Michigan Court of Appeals affirmed these findings. Sitz v Department of State Police, 179 Mich. App. 433; 429 N.W.2d 180 (1988). That court stated that "the defendants' own evidence strongly suggests the finding of a causal relationship between actual arrests and deterrence value" Id. at 441; App. 15a-16a. The Court

of Appeals noted that the Guidelines on which the State Police roadblock program is premised provides that the primary objective of the roadblocks is to "increase the perception of 'risk of apprehension' in the minds of [drinking] drivers" Id. Since the evidence that sobriety roadblocks are not an effective means of achieving arrests was uncontradicted, Id. at 442; App. 17a, the Michigan Court of Appeals affirmed the trial court's determination that "sobriety checkpoints [are] not an effective means of combatting drunk driving." Id. at 443; App. 20a.

Both the trial court and the Michigan Court of Appeals, therefore, found that the second prong of the Brown, supra, analysis must be decided in favor of Plaintiffs. These findings were entirely correct.[2] Petitioners seriously

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2 Petitioners' assert in their brief that the courts below erred in finding roadblocks unconstitutional on the ground that a less restrictive alternative existed. (Petitioners' Brief, pp. 30-32.) This is a serious distortion of the record below. Petitioners' own brief demonstrates this error in noting that the "principal" basis for the

misstate the conclusions rendered below in asserting that sobriety roadblocks were found by these courts to be "somewhat effective." (Petitioners' Brief, p. 24.) In actuality, the Michigan Court of Appeals held that the trial court was correct "in finding that sobriety checkpoints were not an effective means of combatting

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(Cont'd.)

decisions below was that these checklanes simply were not effective. (Petitioners' Brief, p. 23.) The "less restrictive alternative" analysis was irrelevant to this determination. The trial court's consideration of alternative approaches to the drunk driving problem was nonetheless appropriate. Under the State Police program, roadblocks would be operated by officers who would otherwise be on roving patrols. The effectiveness of such patrols in detecting drunk drivers is, therefore, related to the overall effectiveness of roadblocks. If the use of such roadblocks requires the removal of officers from patrol duty -- a far better tool against drunk driving -- the "effectiveness" of such roadblocks in detecting drunk driving is correspondingly reduced. This approach to roadblock effectiveness is particularly evident in the testimony of the three sheriffs called as witnesses by Respondents. This is not a case in which a program has been declared unconstitutional simply because a "less drastic and equally effective means" of addressing the problem existed. Cf. Skinner, 109 S.Ct. at 1419, fn. 9.

drunk driving." (App. 20a.)

C. The Severity of the Interference with Individual Liberty.

There is no doubt that the stopping of vehicles at a sobriety roadblock constitutes an intrusion which is governed by the federal Constitution:

> The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of these Amendments, even though the purpose of the stop is limited and the resulting detention quite brief.

Delaware v Prouse, supra, at 653.

The final factor contained in the Brown standard requires an examination into the extent of the intrusion caused by sobriety roadblocks.[3] This determination has usually been

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3 It is not altogether clear why analysis of this third component in the Brown balancing test is necessary in light of the fact that sobriety roadblocks are "not an effective means of combatting drunk driving." 170 Mich. App. at 443. Regardless of the gravity of the public concern presented by drunk drivers, it would appear impossible to justify the seizure of individuals in roadblocks

divided into two components, the objective and subjective nature of the intrusion. See, United States v Martinez-Fuerte, 428 U.S. 543 (1976).

Based on the short amount of time that each car is required to stop, the trial court concluded that the objective intrusion of a sobriety roadblock was minimal. (App. 104a.) However, this analysis of the original stop does not take into consideration all the factors relevant to a determination of the objective intru-

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(Cont'd.)

when such a seizure in no way serves the public interest in combatting drunk driving. Cf. Almeida-Sanchez v United States, 413 U.S. 266, 273 (1973). Similarly, there would appear to be little need to examine the scope of the intrusion involved in a sobriety roadblock if, as the courts below found, this intrusion, no matter what its scope, simply does not effectively accomplish the asserted law enforcement goal of removing drunk drivers from the road. Petitioners contend that the courts below erred in giving "undue consideration" to the second prong of the Brown balancing test. (Petitioners' Brief, p. 23.) Respondents would suggest that if a constitutionally cognizable seizure designed to combat drunk driving proves totally ineffective for that purpose, no degree of public concern or minimization of the intrusion involved would save this procedure from constitutional challenge.

sion.

If the warrantless, suspicionless seizures of automobile occupants can be effectuated at a sobriety roadblock, several conclusions would appear to follow. Under the decisions of this Court, after effectuating a valid stop of an automobile, a police officer could compel the driver and passengers to get out of the car, Pennsylvania v Mimms, 434 U.S. 106, 111 (1977); once removed from the vehicle, the officer could conduct a pat-down search of the occupants if he notices a bulge in their clothing, Id. at 111-12; the officer could further require the driver to produce a license or other vehicle documents, Texas v Brown, 460 U.S. 730 (1983); should the driver open the car's glove compartment to produce the documents, the officer could shift his position to examine the contents of the glove compartment, Id.; and the officer could shine a flashlight into the passenger compartment of the car and visually inspect its contents and occupants, Id.

During cross-examination, Inspector Fladseth acknowledged that all of these actions would be constitutionally permissible if the original roadblock seizure is adjudged constitutional. He further acknowledged that there is a undeniable potential for police abuse in such a program.

There is another aspect of the roadblock program as designed in Michigan which has a clear impact on the determination of the scope of the objective intrusion. Petitioners have alluded to the fact that the roadblock concept removes discretion from the officer conducting the stop. (Petitioners' Brief, p. 7.) To some extent this is accurate. By requiring roadblock officers to stop all cars, the officers have no choice in selecting who will be stopped. However, as the evidence presented at trial indicated, t e critical determination of whether a driver is to be detained for additional investigation and testing is left totally to the discretion of the officer conducting the stop.

Colonel Hough testified that it was up to the checkpoint officer to determine who to detain further. Lieutenant Slaughter elaborated on this discretion. According to him, an officer making this decision could look to a number of factors. He could base his decision on a strong odor of alcohol in the car, the condition of the driver's clothing, and whether his shirt was completely buttoned. Lieutenant Slaughter further testified that any one of these factors could be enough to convince the roadblock officer to require further investigation of the driver. And, at his deposition, Lieutenant Slaughter was willing to acknowledge that a driver could be required to submit to further testing for no objective reason whatsoever.

Petitioners have sought support for their roadblock program by suggesting that the Guidelines drafted by the State Police remove any authority from the officers in the field. The Defendants' reliance on this fact is significantly undermined by the testimony given by

Colonel Hough and Lieutenant Slaughter. Additionally, the discretion vested in the field officers perhaps accounts for another disquieting statistic developing in the evaluations of such roadblock programs.

Petitioners announce in their brief that the May 1986 roadblock conducted in Saginaw County was "a successful operation." (Petitioners' Brief, p. 8.) This announcement comes without explanation for the limited number of arrests achieved in that roadblock, and without comparison of the number of arrests which may have been achieved if the 17 officers who took part in that operation had each spent three hours using traditional police methods. Putting these concerns aside, the record also shows that of the 126 drivers who passed through that roadblock, only two were detained for further questioning, and only one of these two was arrested. Thus, after being screened by the initial roadblock officer, as many drivers were released after being forced to undergo further examina-

tion and testing as were arrested for drunk driving. These additional, more serious intrusions into the privacy interests of innocent drivers have been documented in other statistical studies of sobriety roadblock operations.

Sobriety roadblocks involve not merely the inconvenience of being stopped for one minute or less. These roadblocks present a far more significant intrusion into the privacy interests of law abiding citizens. See generally, J. Jacobs & N. Stossen, "Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks," 18 U.C. Davis L.R., 595, 650-52 (1985). These additional concerns should be considered in assessing the objective intrusion.

However, both the trial court and the Michigan Court of Appeals held that the subjective nature of the roadblock intrusions was significant. After extensive analysis of both the record and relevant court opinions, the trial court concluded that, "the subjective intru-

sion on individual liberty interests which would be caused by the sobriety checkpoints was substantial." (App. 123a-124a.) The Court of Appeals held that there was sufficient evidence to support the trial court's conclusions on this point. (App. 22a.)

The roadblocks designed by the Michigan State Police are to be conducted at night. A driver approaching a checklane may well be traveling on a darkened, little traveled state highway when he/she is confronted by a sign indicating a sobriety roadblock. Approximately a quarter of a mile later, that driver would discover a large area illuminated by four halogen lights, containing at least 12 police officers, numerous police cars, and other support vehicles. Nevertheless, fear and anxiety would be understandable reactions for a person innocently driving on a quiet public highway who emerges into a brilliantly lighted scene containing at least a dozen police officers and assorted roadblock activities. As the court observed in State v

Smith, 674 P.2d 562 (OK Crim. App. 1984):

> The roadblocks in the present case could well act, and most likely did act, as a total surprise to those passing through. The fear factor involved in this case is heightened by the presence of at least 10 officers, chemical testing equipment, and mobile booking and jail vans actually on the scene. To the individual approaching such a roadblock, it is not unlikely that he would reasonably perceive the officers as being desireous of arresting criminals, and that anyone passing through could easily be arrested.

Id. at 564.

Unlike the roadblocks construed in Martinez-Fuerte, supra, the roadblocks involved in this case are not fixed, but will instead be moved to different locations. And, far from premising their program on the minimization of surprise to the driver, the "effectiveness" of sobriety checklanes (such as it is) is absolutely premised on surprise. As Lieutanant Cotton testified, to obtain any arrest whatsoever through this mechanism, it is essential that the driving public not be aware of the precise location of the roadblocks.

The Michigan courts, therefore, employ-

ed the balancing test prescribed by this Court in concluding that the sobriety roadblocks proposed by Petitioners were unconstitutional. The decisions rendered below were entirely supported by the factual record and appropriate under this Court's decisions.

Petitioners have cited to this Court's recent decisions regarding drug and alcohol testing, Skinner, supra, and National Treasury Employees Union v Von Raab, ___ U.S. ___; 109 S.Ct. 1384 (1989). Contrary to Petitioners' position, these two decisions reinforce the finding that sobriety roadblocks are unconstitutional under Fourth Amendment analysis. In Von Raab, this Court discussed the operation of the Fourth Amendment balancing test as follows:

> While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, our decision in Railway Labor Executives reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. As we note in Railway Labor Executives, our cases

> establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

109 S.Ct. at 1390 (citations omitted; emphasis added).

In Von Raab, this Court found that the Custom Service's drug testing program "is not designed to serve the ordinary needs of law enforcement," 109 S.Ct. at 1390, and proceeded to apply a balancing test. In Skinner, the Government's interest in regulating the conduct of railroad employees to ensure safety presented "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." 109 S.Ct. at 1414.

Sobriety roadblocks, by comparison, are instituted to remove drunk drivers from the road through the enforcement of applicable criminal laws. There can be no justification for such

roadblocks "beyond the normal need for law enforcement" of state laws proscribing drunk driving. Von Raab, 109 S.Ct. at 1390.

Von Raab and Skinner indicate that a seizure conducted for the sole purpose of enforcing a state's criminal laws which is not based upon probable cause or reasonable suspicion of any kind is unreasonable under the Fourth Amendment. These cases suggest that the balancing test employed by the courts in this case was not even necessary to the determination that sobriety roadblocks violate rights secured by the Fourth Amendment.

II. THE MICHIGAN CONSTITUTION CONSTITUTES AN ADEQUATE AND INDEPENDENT STATE GROUND PRECLUDING REVIEW BY THIS COURT.

The decision rendered by the courts below should not be reviewed by this Court since the Michigan Constitution constitutes an independent and adequate basis for the decision determining sobriety roadblocks to be unconstitutional.

Petitioners assert that this case is

governed by Michigan v Long, 463 U.S. 1032 (1983). In this case, unlike Long, a court has expressly determined that sobriety roadblocks are unreasonable under the Michigan Constitution. The trial court gave separate consideration to the Michigan Constitution's application to roadblocks. (App. 124a-131a.) Citing exclusively Michigan cases construing the state Constitution, the trial court found that the Michigan Constitution required "at least an individualized articulable suspicion that some criminal wrongdoing had or was about to occur." (App. 130a.)

There is no doubt that the trial court's decision was independently premised on the Michigan Constitution under Long, supra. Furthermore, the trial court's determination under the Michigan Constitution was not disturbed by the Michigan Court of Appeals. (App. 24a-25a.) Under such circumstances, the finding with respect to the Michigan Constitution provides an independent basis for the finding of unconstitu-

tionality.

CONCLUSION

A somewhat lengthy analysis of the factual record has been included in this Brief to demonstrate that the central dispute in this case revolves around the factual conclusions arrived at by the trial court, not the appropriate legal test under the Fourth Amendment. These predominently factual disputes make this a particularly inappropriate case for review by this Court.

The courts below properly concluded on the basis of the factual record developed at trial that sobriety roadblocks violated the Fourth Amendment of the United States Constitution. For the foregoing reasons, the Petition for Writ of Certiorari to the Michigan Court of Appeals should be denied.

Respectfully submitted,

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Dated: June 27, 1989

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APPENDIX
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STATISTICS COMPILED BY MARYLAND STATE POLICE DURING THREE MONTH PILOT PROGRAM: DECEMBER, 1982 - FEBRUARY, 1983

	HARFORD COUNTY (Target County Where Roadblocks Employed)		FREDERICK COUNTY (Control County Where No Roadblocks Employed)	
I. COMPARISON OF DRIVING STATISTICS DURING PILOT PROGRAM AND DRIVING STATISTICS DURING PREVIOUS YEAR				
	Dec. 1981-Feb. 1982	Dec. 1982-Feb. 1983 Test Period	Dec. 1981-Feb. 1982	Dec. 1982-Feb. 1983 Test Period
Alcohol Related Accidents	133	120	108	96
% Decrease		-10%		-11%
Fatal Accidents	3	8	10	3
% Difference in Fatal Accidents		+167%		-70%
II. COMPARISON OF DRIVING STATISTICS DURING PILOT PROGRAM AND PRECEDING THREE MONTHS				
	Sept.-Nov. 1982	Dec. 1982-Feb. 1983	Sept.-Nov. 1982	Dec. 1982-Feb. 1983
Alcohol Related Accidents	144	120	109	96
% Difference in Alcohol Related Accidents		-17%		-12%
Fatal Accidents	11	8	4	3
%Decrease		-27%		-25%